APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

JAMES H. HIGGASON, JR.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 77A01-0511-CV-523
	)	
DENNIS BARGER, et al.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE SULLIVAN SUPERIOR COURT
The Honorable J. Blaine Akers, Special Judge
Cause No. 77D01-0401-PL-7

August 22, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

James H. Higgason, pro se, appeals from the trial court's order granting judgment on the pleadings in favor of the Indiana Department of Correction ("IDOC") and several IDOC employees, including Dennis Barger, Thomas Motney, P. Chatman, Alan Finnan, Jeremy Ducharme, and John Fidler (collectively "the Defendants"). He presents the following issues for our review, which we consolidate and restate as:

1. Whether the trial court erred when it granted the Defendants' motion for judgment on the pleadings.

2. Whether the trial court erred when it denied his second and third motions for recusal.

We affirm.[1]

FACTS AND PROCEDURAL HISTORY[2]

Higgason is an inmate housed in the Secured Housing Unit ("SHU") at the Wabash Valley Correctional Facility ("WVCF"). The defendants are employees of IDOC. In his complaint, Higgason lists three causes of action and alleges the following:

1. By their acts, inactions and practices the Defendants have caused Higgason to suffer personal and constitutional injuries in violation of Article I, Section 9 of the Constitution of Indiana.

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[1] Higgason also claims that the Indiana General Assembly and the Indiana Judiciary are conspiring to create a situation where IDOC is permitted to encroach upon the State and Federal Constitutional Rights of prisoners. To the extent that we can discern his claim, he appears to allege that Indiana Code Section 34-58-2-1 is constitutionally unsound. But Higgason filed his complaint before the effective date of that statute. P.L.80-2004, § 6 (eff. July 1, 2004). Therefore, that statute does not apply to his claim, and we need not address that portion of his appeal.

[2] Because Higgason appeals from the grant of the Defendants' motion for judgment on the pleadings, we presume the facts stated in his complaint are true. See Fox Dev., Inc. v. England, 837 N.E.2d 161, 164 (Ind. Ct. App. 2005) ("we may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted").

> 2. By their acts, inactions and practices the Defendants have caused Higgason to suffer personal and constitutional injuries in violation of Article I, Section 12 of the Constitution of Indiana.
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> 3. By their acts, inactions, practices, and callous or deliberate indifference the Defendants have caused Higgason to suffer personal and constitutional injuries, causing him pain, suffering, humiliation, mental anguish and emotional distress in violation of Article I, Section 16 of the Constitution of Indiana.

Appellant's App. at 24a. He further maintains that Barger and Motney turned on his "in-cell light on maximum illumination in the middle of the night for the sole purpose of harassing [him]" and that this impeded his ability to sleep. Appellant's App. at 25a. In January 2002, Higgason grabbed Barger's arm and confronted him for refusing to instruct other officers to reduce the light in Higgason's cell. As a result of this incident, the State charged Higgason with battery.

Higgason also claimed that Barger removed food from his breakfast tray. In particular, Higgason states that on February 7, 2002, "when [he] received his breakfast tray the biscuits from said tray had been removed." Id. at 27a. When he noticed the missing biscuits, he "immediately began yelling for the officer who had just handed him his tray . . . . But the officer just ignored Higgason's bellows[.]" Id. He also claims that "he knew that he was being ignored so he took the lid from his breakfast tray and began banging on the door to his cell, so there was no question that Higgason needed that officer's assistance." Id. He then extended his arm through the cuff-port in his cell door and repeatedly pushed the intercom button. Eventually, Barger and Motney "entered the range and ordered Higgason to stop pushing the intercom button." Id. at 28a. Higgason put the breakfast tray lid in the cuff-port, and Barger took the tray as Motney closed the

cuff-port. Incensed, Higgason took his breakfast tray and beat on the cuff-port door until it popped open, at which point he put his hands through the hole and demanded to speak with the sergeant. In response to his demand, Higgason claims that Barger hit him on the left forearm with the lid of his breakfast tray.

On the same day that Higgason filed his complaint in the present action, he also filed a motion to recuse Magistrate Mischler. The court granted his motion. Then, on January 22, 2004, Special Judge Blaine Akers was appointed.

On September 14, 2004, the trial court dismissed Higgason's complaint as frivolous under Indiana Code Section 34-58-1-1. Higgason appealed, and on April 29, 2005, we reversed and remanded to the trial court because Indiana Code Section 34-58-1-1 was not in effect at the time he filed his complaint. Higgason v. Barger, Cause Number 77A05-0410-CV-553 ("Higgason I").

On remand, Higgason filed a second motion to recuse. The trial court denied his motion and, on October 5, 2005, Higgason filed a third motion to recuse, which the trial court also denied. The Defendants filed a motion for judgment on the pleadings. On October 21, 2005, the trial court granted the Defendants' motion. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Judgment on the Pleadings

Higgason first contends that the trial court erred when it granted the Defendants' motion for judgment on the pleadings. Specifically, he maintains that he filed suit under Indiana Code Section 34-13-3-1, et seq. and, therefore, sufficiently stated a valid claim. We cannot agree.

Indiana Trial Rule 12(C) provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Ind. Trial Rule 12(C). Like a motion to dismiss for failure to state a claim pursuant to Trial Rule 12(B)(6), a Trial Rule 12(C) motion attacks the legal sufficiency of the pleadings. Loomis v. Ameritech Corp., 764 N.E.2d 658, 661 (Ind. Ct. App. 2002) (citation omitted). A motion filed under Rule 12(B)(6) requires the court to review only the complaint, while a motion filed under Rule 12(C) requires the court to review all pleadings filed in the case. Fox Dev., Inc. v. England, 837 N.E.2d 161, 164 (Ind. Ct. App. 2005).

The test to be applied when ruling on a Rule 12(C) motion is whether, in the light most favorable to the non-moving party and with every intendment regarded in his favor, the complaint is sufficient to constitute any valid claim. Id. at 165 (citation omitted). In applying this test, we may look only at the pleadings, with all well-pleaded material facts alleged in the complaint taken as admitted, supplemented by any facts of which the court will take judicial notice. Id. (citation omitted). The standard of review is de novo, and we will affirm the trial court's grant of a Rule 12(C) motion for judgment on the pleadings when it is clear from the face of the pleadings that one of the parties cannot in any way succeed under the operative facts and allegations made therein. Id. (citation omitted).

We begin by noting that Higgason relies on opinions from federal courts to support his claim that pro se litigants should not be held to the same standard as licensed lawyers. While the cases he cites are controlling for federal cases arising in those

circuits, they do not bind us. In Indiana, it is well-settled that a person proceeding pro se is held to the same standard as are licensed lawyers. Goossens v. Goossens, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005). Accordingly, we hold Higgason to that same standard in this case.[3]

As noted above, Higgason contends that the trial court erred when it granted the Defendants' motion for judgment on the pleadings. To review an order granting judgment on the pleadings, we must review all pleadings filed in the case. See Fox Dev., Inc., 837 N.E.2d at 164. That includes the Defendants' answer. It is appellant's burden upon appeal to show that the trial court erred. Gardner v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997). Further, Indiana Appellate Rule 50(A)(2)(f) provides, in relevant part: "The appellant's Appendix shall contain a table of contents and copies of the following documents, if they exist: (f) pleadings and other documents from the Clerk's Record in chronological order that are necessary for resolution of the issues raised on appeal[.]" (Emphasis added). But Higgason has eschewed his appellate duty and failed to include the Defendants' answer in his appendix. Therefore, the issue is waived.

In addition, the trial court's order granting the Defendants' motion for judgment on the pleadings suggests that it might have considered evidence outside the pleadings.

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[3] Higgason is no stranger to our state and federal courts. Indeed, he claims that he is a "prolific pro se prison litigator." Brief of Appellant at 55. In a prior appeal, we noted that "[he] has initiated numerous lawsuits against prison officials and employees. In all, it appears that Higgason has initiated at least thirty-six separate appeals in this court, and we find him listed as having filed at least fifteen separate lawsuits in federal court." Higgason v. Stogsdill, 818 N.E.2d 486, 488 (Ind. Ct. App. 2004). Despite Higgason's contention, our prior statement regarding his litigious proclivity does not "condemn" his lawsuits. Rather, when read in context, it illustrates that Higgason is familiar with judicial and quasi-judicial proceedings. See id.

Specifically, the trial court's order states that it heard "testimony from both parties[.]" Brief of Appellant at 1a. "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Trial] Rule 56[.]" T.R. 12(C). It is the appellant's duty to provide "any . . . short excerpts from the Record on Appeal [, such as] brief portions of the Transcript[] that are important to a consideration of the issues raised on appeal[.]" App. R. 50(A)(2)(g). In the present case, Higgason not only failed to provide a copy of the Defendants' answer but he also did not provide a copy of the transcript.[4] Thus, we cannot discern what evidence the trial court considered. Regardless, Higgason has not provided a sufficient record on appeal and, therefore, he has not established that the trial court erred when it granted the Defendants' motion for judgment on the pleadings.

Issue Two: Motion to Recuse

Higgason also contends that the trial court "abused its discretionary authority by denying [his] motion to recuse Special Judge J. Blaine Akers." Brief of Appellant at 49-50. On January 12, 2004, the same day he filed his complaint in the instant action, Higgason filed a motion under Indiana Trial Rule 76(B) to recuse Magistrate Mischler. The trial court granted that motion and, thereafter, Judge Akers served as presiding judge. The court then dismissed Higgason's claims under Indiana Code Section 34-58-1-2 because it found that they were "frivolous in that they are made to harass the Indiana

[4] We note that even if a transcript is unavailable, a party or the party's attorney may prepare a verified statement of the evidence from the best available sources, which may include the party's or the attorney's recollection. App. R. 31(A).

Department of Correction and its employees[,] and they lack an arguable basis in law and fact." Appellant's App. at 7a. Higgason appealed, and we reversed and remanded because Higgason had filed his complaint several months before Indiana Code Section 34-58-1-2 took effect.

On remand, Higgason filed a motion to recuse Judge Akers, but the trial court denied his motion. He now claims that the trial court abused its discretion when it denied that motion to recuse. Indiana Trial Rule 76(B) provides:

> In civil actions, where a change may be taken from the judge, such change shall be granted upon the filing of an unverified application or motion without specifically stating the ground therefore by a party or his attorney. Provided, however, a party shall be entitled to only one [1] change from the judge.

Rose v. Mercantile Nat'l Bank of Hammond, 844 N.E.2d 1035, 1047 (Ind. Ct. App. 2006). The rule further states, "when a new trial is granted, whether the result of an appeal or not, the parties thereto shall have ten [10] days from the date the order granting the new trial is entered on the record of the trial court[.]" T.R. 76(C)(3). But the Defendants maintain that the trial court had not conducted a trial when it originally dismissed Higgason's complaint under Indiana Code Section 34-58-1-2 and, therefore, he was not entitled to a new change of judge following remand. We agree with the Defendants.

Our Supreme Court has explained:

> Courts conduct trials upon issues of law and issues of fact. The end result is a judgment. Upon reversal of a judgment produced by a trial upon issues of law and issues of fact, the appellate remand contemplates a retrial of like character, and the right to a change of judge arises anew under [Trial Rule 76(C)]. Such a retrial is a new trial within the meaning of this rule, and this

> conclusion follows even though the issues do be retried to not include all those resolved in the first trial.

State ex rel. Hahn v. Howard Circuit Court, 571 N.E.2d 540, 541 (Ind. 1991) (citations omitted). But here, the trial court did not conduct a trial. Rather, the court dismissed Higgason's complaint because it determined, in part, that it was frivolous. Because the trial court did not conduct a trial upon issues of law and issues of fact, Higgason was not entitled to another change of judge following remand.

Affirmed.

SHARPNACK, J., and ROBB, J., concur.